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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

In re ENRON CORPORATION SECURITIES LITIGATION	Civil Action No. H-01-3624 (Consolidated)
This Document Relates To: MARK NEWBY, *et al.*, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, -v.- ENRON CORP., *et al.*, Defendants.	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, -v.- KENNETH L. LAY, *et al.*, Defendants.	

MEMORANDUM OF LAW
OF DEFENDANT CITIGROUP, INC.
IN SUPPORT OF ITS MOTION TO DISMISS

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TO THE HONORABLE MELINDA HARMON, UNITED STATES DISTRICT JUDGE:

Defendant Citigroup, Inc. ("Citigroup") submits this memorandum of law in support of its motion, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), to dismiss the Consolidated Complaint for Violation of the Securities Laws (the "complaint"; cited herein as "Cplt. ¶ _").

PRELIMINARY STATEMENT

Plaintiffs' claims against Citigroup rest on the premise that Citigroup acted in a way that was fundamentally irrational and against its own economic interest. Plaintiffs allege that Citigroup "knew" that Enron's financial statements were fraudulent, that its financial condition was "precarious" and dependent on fraudulently maintaining an unsustainably high stock price, and that Enron was a "house of cards," a "hall of mirrors," and a "Ponzi scheme." Yet, despite knowing these "facts"—according to plaintiffs—Citigroup still loaned Enron hundreds of millions of dollars during the class period, risking that vast sum in the hope that the Ponzi scheme would not collapse before it was able to get its money back. Under well-settled law, the "strong inference of scienter" that is required to plead a securities fraud claim cannot be based on ascribing to the defendant such irrational and implausible motives.

In their evident desire to identify purported deep pockets in the wake of Enron's bankruptcy and Arthur Andersen's well-publicized financial distress, plaintiffs have now broadened their complaint to assert claims against Citigroup and eight other commercial and investment banks that did business with Enron. Yet virtually all of the allegations in plaintiffs' 500-page complaint have absolutely nothing whatever to do with Citigroup. Thus, to take just a few examples, Citigroup is *not* alleged to have been responsible for, or to have had anything to do with:

- Enron's allegedly misleading financial statements or allegedly abusive accounting;
- Enron's allegedly fraudulent accounting practices such as "moving the curve" and "snowballing";

- Enron's misleading statements about the profitability and prospects of its wholesale energy and broadband businesses, its joint venture with Blockbuster, "dark fiber" swaps with Qwest and others; or
- illegal insider trading by Enron executives.

Instead, plaintiffs' claims against Citigroup—when stripped of overheated rhetoric, sweeping and undifferentiated allegations about "Enron's banks," and conclusory suggestions of improper motive—rest essentially on allegations that Citigroup provided routine commercial and investment banking services to Enron and engaged in the ordinary business of a securities brokerage. Specifically, plaintiffs allege that Citigroup (i) participated in loans of over $4 billion to Enron, and itself loaned Enron "hundreds of millions of dollars"; (ii) engaged in $2.4 billion in prepaid commodity swaps with Enron that plaintiffs allege functioned as additional loans; (iii) participated in underwriting syndicates for Enron securities; (iv) helped to "structure and finance" an Enron-affiliated partnership; and (v) issued positive analysts' reports about Enron. (Plaintiffs make substantially the same allegations about each of the other banking defendants.) In effect, plaintiffs' claims against Citigroup and the other bank defendants rest on the dubious theory that "[t]o have had any profitable dealings at all with Enron was to have aided and abetted fraud." *Wall Street Journal*, April 17, 2002, at A20 (editorial).

Plaintiffs assert claims against Citigroup under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and (with respect to one securities offering) under Sections 11 and 15 of the Securities Act of 1933. As a matter of law, these claims fail for the following reasons and should be dismissed:

First, plaintiffs do not come close to satisfying the basic requirements for pleading a claim of fraud with specificity under the Private Securities Litigation Reform Act ("PSLRA") and Fed. R. Civ. P. 9(b). To begin with, plaintiffs do not satisfy their basic pleading obligation to specify the allegedly fraudulent statements that they attribute to Citigroup, and to explain why those statements are false. Instead, over more than 150 pages, plaintiffs identify and purport to quote from, in chronological order, hundreds of public statements made about Enron by various defendants and others—before and during the three-year class period—and then broadly allege that "each" of these statements was false and misleading. As the courts have repeatedly held, this blunderbuss approach to pleading does not satisfy either the PSLRA or Rule 9(b) (or, for that matter, even the requirement under Fed. R. Civ. P. 8(a) that every pleading set forth a "short and plain statement of the claim"). (*See* pp. 32-34, below.)

Second, plaintiffs do not even remotely satisfy their burden under the PSLRA to plead facts creating a "strong inference of scienter." The complaint nowhere identifies a single communication, written or oral, showing that Citigroup knew that Enron's reported financials were fraudulent or that Enron's business was a Ponzi scheme. Instead, plaintiffs rely on conclusory allegations that Citigroup somehow must have learned of the fraud because it performed "due diligence" as a lender and underwriter, or because Citigroup employees "interacted" with Enron executives "on an almost daily basis." Such conclusory allegations of scienter have repeatedly been held inadequate under the PSLRA, including only last month by this Court in *Kurtzman*.[1] (*See* pp. 34-41, below.)

Plaintiffs' failure to allege facts creating the required strong inference of scienter is underscored by the patent irrationality of the scheme they allege. Plaintiffs do not and cannot explain why Enron's executives, allegedly engaged in a "frenzy of fraud" in which they misrepresented the company's financial condition in every way possible for years on end, would nevertheless have unburdened themselves of the truth to their own lenders. Nor do plaintiffs explain why any rational lender would expose itself to hundreds of millions of dollars of losses to a borrower that it knew was a Ponzi scheme, even if (as plaintiffs allege) it might earn fees and interest from those transactions. (The fees, of course, were orders of magnitude less than the losses Citigroup potentially faced, and Citigroup would earn interest only if Enron was around to pay it.) Yet plaintiffs ask the Court, not just to believe that Citigroup acted in that irrational manner, but to *infer* from the transactions themselves that Citigroup *knew* that Enron was a fraud. As the courts repeatedly have held, such allegations—which presume that a defendant acted contrary to its economic self-interest—do not satisfy plaintiffs' burden of pleading scienter. (*See* pp. 42-43, below.)

Third, plaintiffs also fail to state a claim against Citigroup under Section 10(b) because their claim, at most, is one for aiding and abetting, and the Supreme Court squarely held in *Central Bank of Denver* v. *First Interstate Bank of*

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1 *Kurtzman* v. *Compaq Computer Corp.*, Civil Action No. H-99-779 (S.D. Tex. April 1, 2002) (Harmon, J.).

Denver, 511 U.S. 164 (1994), that no private civil claim exists for aiding and abetting a violation of Section 10(b). Plaintiffs allege that Citigroup "assisted" Enron's alleged fraud by structuring transactions (such as the prepaid swaps) that Enron subsequently falsely characterized in its financial statements. Yet, plaintiffs do not allege that Citigroup played any role whatsoever in preparing Enron's financial statements (which were prepared by its auditor, Arthur Andersen), or any of Enron's other public statements. Absent any such allegations, plaintiffs' claims against Citigroup are barred as a matter of law under *Central Bank* and its progeny. (*See* pp. 44-50, below.)

Fourth, plaintiffs' claim under Section 11 of the 1933 Act also is barred as a matter of law because, among other things, the only representative plaintiff who allegedly purchased the security at issue did so more than two years *after* that security was first issued (as his sworn certification reflects). Section 11 provides that a plaintiff who acquired the securities more than a year after the securities were first issued must plead *actual reliance* on the alleged misstatements in the prospectus. Plaintiffs have not pleaded reliance here. Nor could they, because the financial information in the prospectus was more than three years old when the representative plaintiff made his purchases. And he made those purchases after a torrent of negative reports about Enron had become public, including news of a formal SEC investigation and shareholder lawsuits (including ones that are part of this consolidated case) alleging that Enron's financial statements were materially misleading. (*See* pp. 50-58, below.)

In view of these and numerous other patent deficiencies in the complaint discussed below, it is clear that plaintiffs' counsel "isn't expecting to prove his case in court, but only in the media, hoping defendants will settle regardless of guilt to get their names out of the news." *Wall Street Journal*, April 17, 2002, at A20 (editorial). This Court, we respectfully submit, should not be party to this misuse of the judicial process.

For these reasons and those discussed below, plaintiffs' claims against Citigroup should be dismissed.

SUMMARY OF PLAINTIFFS' ALLEGATIONS[2]

A. The Core Allegations of Fraud in the Complaint Are Not Attributed to Citigroup

The complaint purports to describe a wide-ranging fraudulent scheme by Enron and Enron's insiders over many years to inflate Enron's profits, hide its debt, and misrepresent the profitability and prospects of its businesses. (*E.g.*, Cplt. ¶ 2.) Plaintiffs allege that Enron engaged in elaborate accounting manipulations, issued fraudulent financial statements, reported "[b]illions of dollars in phony profits" (*id.* ¶ 70), and repeatedly misrepresented the success and viability of its businesses. In substance, according to plaintiffs, Enron was a "hall of mirrors inside a house of cards" (*id.* ¶ 18) and a "Ponzi scheme" (*id.* ¶¶ 53, 684).

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2 On this motion to dismiss, the Court "is required to view as true and in a light most favorable to Plaintiff[s] only 'well-pleaded facts.'" *Kurtzman*, No. H-99-779, slip op. at 42. Thus, "conclusory allegations or legal conclusions masquerading as factual conclusions do not defeat a motion to dismiss." *Collmer* v. *U.S. Liquids, Inc.*, Civil Action No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *4 n.2 (S.D. Tex. Jan. 23, 2001) (Harmon, J.). In addition, the Court may consider on this motion the full text of SEC filings and other public documents that are cited or relied upon in the complaint. *Id.* Copies of all such documents cited herein are submitted herewith as exhibits to the Affidavit of Richard A. Rosen, sworn to May 7, 2002 ("Rosen Aff."). For purposes other than this motion, of course, Citigroup does not concede the truth of any of plaintiffs' allegations concerning it; to the contrary, Citigroup vigorously disputes those allegations, as well as the purported merits of plaintiffs' claims.

As a careful review of the complaint makes clear, however, plaintiffs' central allegations of accounting fraud and misrepresentations regarding the profitability of Enron's businesses are nowhere attributed to Citigroup—except in unsupported, conclusory allegations about unspecified conduct by "certain banks" or "the banks." To the contrary, the allegations of the complaint make clear that Citigroup neither was involved in nor had knowledge of these alleged fraudulent acts.

Thus, Citigroup was neither an Enron insider nor Enron's auditor, and it accordingly is not alleged—and could not be alleged—to have been responsible for any of Enron's allegedly abusive accounting practices. Tellingly, there is no allegation that Citigroup was responsible for:

- Enron's alleged misuse of mark-to-market accounting (Cplt. ¶¶ 36-38; 155(f); 214(f); 300(e), (f), (g), (n) and (o); 339(e), (f), (g), (n) and (o); 418(d); 423; 426; 533-57);

- "moving the curve," *i.e.,* altering assumptions used to estimate income on already executed contracts in order to increase future revenues accounted for using mark-to-market accounting (*id.* ¶¶ 36; 121(g); 214(e); 300(e) and (n); 339(e) and (n); 536-37);

- hiding costs incurred in connection with unsuccessful bids or project proposals by deferring them to future bids or proposals (a practice the complaint refers to as "snowballing") (*id.* ¶¶ 121(f); 155(j) and (k); 214(o); 580-82);

- violating GAAP in accounting for long-term construction contracts (*id.* ¶¶ 575-79);

- improperly accounting for long-term assets and investments (*id.* ¶¶ 583-609); or

- illegal sales of Enron stock by insiders on inside information (*id.* ¶¶ 83-84).

Nor does the complaint allege any facts showing that Citigroup was responsible for misrepresentations about the profitability or prospects of Enron's various business ventures, including its broadband transactions (Cplt. ¶¶ 423; 426; 520-32); its wholesale business (*id.* ¶¶ 121(e); 155(e); 214(e); 300(e)); its joint venture with Blockbuster (*id.* ¶¶ 36; 40-41; 300(o); 339(o); 418(d); 521-26); or its merchant investments (*id.* ¶¶ 300(p); 339(p); 385).

Nor, finally, does the complaint allege any facts showing that Citigroup participated in or knew about numerous transactions that plaintiffs claim were fraudulent or were accounted for fraudulently, including the JEDI and Chewco transactions (Cplt. ¶¶ 10-11; 22; 435-47); Enron's "dark fiber" swaps with Qwest (*id.* ¶¶ 43; 214(j) and (k); 300(i) and (j); 339(i) and (j); 361; 527-32); and Enron's purchase of Wessex Water (*id.* ¶ 121(h)).

In short, the overwhelming majority of the allegedly fraudulent or illegal conduct set forth in the complaint has nothing whatsoever to do with Citigroup.

B. Alleged "Involvement of Citigroup"

Plaintiffs' specific allegations relating to Citigroup are set forth in paragraphs 674-92 of the complaint, in a section entitled "Involvement of Citigroup." Plaintiffs allege that Citigroup (i) made commercial banking loans to Enron; (ii) underwrote Enron securities and securities of issuers related to Enron; (iii) engaged in "prepaid swaps" with Enron that plaintiffs allege were a form of financing; (iv) helped to "structure and finance" one of Enron's special purpose partnerships (LJM2), which plaintiffs allege Enron subsequently used to engage in fraudulent transactions involving other partnerships; (v) issued notes to investors based on Enron's credit; (vi) attempted to arrange a merger between Enron and Dynegy; and (vii) issued positive stock analysts' reports concerning Enron.[3]

As we now show, plaintiffs' allegations relating to Citigroup, when stripped of overblown rhetoric and conclusory allegations of misconduct, show only that Citigroup provided routine (although sizable) commercial and investment banking and securities brokerage services with respect to Enron.

1. Bank Loans

First, plaintiffs allege that Citigroup was one of Enron's principal bank lenders. They allege that Citigroup helped to syndicate more than $4 billion in bank loans to Enron between May 1998 and November 2001, and that Citigroup itself loaned Enron "hundreds of millions of dollars." (Cplt. ¶ 680.) Plaintiffs allege no facts showing that these loans were anything other than ordinary commercial bank loans to a large corporate customer.

2. Underwriting Enron Securities

Next, plaintiffs allege that Citigroup (together with other investment banks) underwrote Enron securities (Cplt. ¶ 677; *see also id.* ¶¶ 48; 116; 135; 165) and securities of New Power and Yosemite, two entities related to Enron (*id.* ¶¶ 678-79; *see also id.* ¶ 49). Citigroup is alleged to have been a lead underwriter only for one offering,

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3 For purposes of this motion only, we accept as true plaintiffs' allegation that the entity that did these things was Citigroup, Inc. In fact, however, any business dealings with Enron were those of Citigroup's subsidiaries, including Citibank, N.A. and Salomon Smith Barney, Inc.

that of 7% exchangeable notes issued in August 1999 (discussed further below at pp. 25-27). (*Id.* ¶ 685.)

The complaint repeatedly suggests—with no factual support whatsoever—that Citigroup was somehow responsible for misconduct in which Enron allegedly engaged with the funds received from these underwritings. Thus, for example, plaintiffs allege that in underwriting the initial public offering for New Power, "Citigroup enabled Enron through a bogus transaction with a SPE controlled by LJM2 to record a huge $370 million 4thQ 00 profit on the purported 'gain' in value on the 13.6 million shares and 42.1 million warrants of New Power which Enron continued to hold." (Cplt. ¶ 679.) In other words, plaintiffs seek to hold Citigroup responsible for the alleged decision by an Enron affiliate improperly to record a profit on New Power warrants, merely because Citigroup underwrote the issuance of New Power stock. The complaint offers no support for the inference that Citigroup was involved in that alleged fraud, and there is none. Indeed, the complaint itself alleges elsewhere that it was Vinson & Elkins, Kirkland & Ellis, Andersen, and CIBC that engineered the "bogus" transaction after the New Power IPO, making no mention of Citigroup's alleged role. (*Id.* ¶ 42.)

3. Prepaid Swaps

Plaintiffs further allege that "Citigroup lent Enron $2.4 billion in a series of manipulative devices and transactions—prepaid swaps conducted via Citigroup's Cayman Island subsidiary called Delta." (Cplt. ¶ 684.) Plaintiffs allege that, in these transactions, Citigroup paid Enron cash up front equal to "an estimate of the fair value of its portion of the swaps," and received in return the right to have the money repaid over a five-year period. (*Id.*) Plaintiffs allege that these transactions were economically equivalent to loans, and that Enron misrepresented them on its balance sheet as assets and liabilities from price risk management and accounts payable and receivable rather than loans. (Cplt. ¶ 684; *see also id.* ¶¶ 45; 70(c); 565-66; 568.)

These allegations do not give rise to any inference of misconduct on the part of Citigroup. Plaintiffs do not allege, except in purely conclusory terms, any facts showing that *Enron* should have accounted for these transactions as loans rather than derivative trades. Indeed, the complaint grudgingly concedes that they "technically" *were* derivative transactions rather than loans. (Cplt. ¶ 684.) Nor do plaintiffs allege that Enron's accounting for these swaps as swaps—rather than loans—violated GAAP or any other rule. Moreover, even if, as plaintiffs allege, Enron improperly accounted for these transactions, plaintiffs allege no facts showing that *Citigroup* was responsible for (or even knew about) Enron's accounting, or that it knew or should have known that Enron's accounting was improper, much less fraudulent.

4. LJM2

Plaintiffs also allege that Citigroup helped to "structure and finance," in an unspecified way, one of Enron's affiliated partnerships, LJM2, and that Citigroup or some of its employees invested $15 million in that partnership. (Cplt. ¶ 687; *see also id.* ¶¶ 460-61.) (Elsewhere in the complaint, plaintiffs allege that Citigroup and JP Morgan "administered all the financial affairs of LJM2, *i.e.,* profit distributions and capital calls" (*id.* ¶ 27), although they do not specify what such "administer[ing]" involved. The complaint nowhere alleges that Citigroup or any of its employees had any other involvement in the management of LJM2.) Plaintiffs then allege at great length that Enron subsequently engaged in a variety of fraudulent transactions involving LJM2, whereby Enron improperly inflated its reported earnings. (Cplt. ¶¶ 448-49; 460-65; 469-95.)

None of these allegations relating to Citigroup is pleaded with any specificity, and there are no allegations, other than conclusory and unsupported ones, that Citigroup knew of or participated in any misconduct involving LJM2 that occurred after Citigroup's investment. Even if, as plaintiffs allege, Citigroup helped to structure and finance LJM2, invested in LJM2, and administered the profit distributions and capital calls for LJM2, it does not follow that Citigroup was aware of the nature or character of LJM2's individual transactions, or that Citigroup was aware of Enron's accounting treatment of those transactions on its own books.

Indeed, the *only* specific allegation in the complaint concerning any involvement by Citigroup with any LJM2 transaction shows that Citigroup's involvement was entirely peripheral. (Cplt. ¶¶ 473-74.) Thus, it is alleged that Citigroup, together with Barclays, underwrote certificates issued by the Yosemite trust, and that Enron, somehow "working with" Citigroup and Barclays, subsequently sold Yosemite certificates to LJM2. (*Id.* ¶ 473.) Plaintiffs allege that LJM2 held the certificates only briefly before selling them to another entity, and that the transaction "was a sham to allow Enron to avoid reporting its interest [i]n Yosemite in its year-end financial statements." (*Id.* ¶ 474.) Plaintiffs do not allege that Citigroup was aware that this was a sham transaction, and no such inference could reasonably be drawn from the facts alleged.

5. Enron Credit-Linked Notes

Plaintiffs allege that Citigroup hedged a portion of its credit exposure to Enron by issuing "credit-linked notes," notes linked to Enron's credit status. (Cplt. ¶ 681; *see also id.* ¶ 47.) Plaintiffs allege that these notes functioned for Citigroup "like an insurance policy for its credit exposure to Enron." (*Id.* ¶ 681.)

Plaintiffs do not allege any facts showing that these credit-linked notes were in any way improper or fraudulent. While plaintiffs allege, in conclusory fashion, that Citigroup's issuance of these notes evidences its alleged awareness of Enron's "true financial condition" (*id.*), plaintiffs concede that, even with this alleged insurance, Citigroup remained exposed to Enron for "hundreds of million of dollars" in conventional loans alone (*id.* ¶ 680).

Moreover, contrary to plaintiffs' suggestion that these credit-linked notes were somehow novel or unusual, credit-linked notes are a well-recognized derivatives instrument, issued and traded in huge volumes each year by a wide variety of issuers for a wide variety of entirely proper purposes. In the year 2000, the market for credit-linked notes was approximately $100 *billion*. *See* Financial Times (London), *Survey-Derivatives 2000*, June 28, 2000 (Rosen Aff., Ex. A), at 4. As explained in the Federal Reserve Bank of San Francisco Economic Letter, dated November 23, 2001:

> [A]n alternative structure, known as a credit-linked notes facility, permits credit risk to be spread across a larger number of guarantors. In this structure, a separate company, known as a special purpose financing vehicle (SPV), is established, often by the owner of the reference credit, and it issues debt securities whose payments are linked to the credit quality of a reference credit.

Federal Reserve Bank of San Francisco Economic Letter, November 23, 2001 (Rosen Aff., Ex. B), at 1. Citigroup's issuance of these routine debt instruments in this case cannot give rise to any inference of fraud.

6. Attempted Merger with Dynegy

Plaintiffs further allege that in October and November 2001, Citigroup (together with JP Morgan) attempted to arrange a merger between Enron and Dynegy to save Enron from insolvency, and that, if the merger occurred, Citigroup would earn approximately $45 million in fees. (Cplt. ¶ 688; *see also id.* ¶¶ 64-66; 387; 389; 391; 690.)

Plaintiffs allege no facts showing that it was in any way improper for Citigroup to attempt to arrange a merger between Enron and Dynegy, or that Citigroup acted improperly in so doing. (Indeed, such a merger plainly would have benefited plaintiffs and all other Enron shareholders.) Nor does the complaint allege any facts showing that Citigroup's pursuit of the merger involved anything other than rendering ordinary investment banking services for a client.[4]

[4] Plaintiffs also allege that, in early November 2001, in connection with the prospective Dynegy merger, former Treasury Secretary Robert Rubin, the Vice Chairman of Citigroup, together with the Chairman of JP Morgan, attempted unsuccessfully to persuade Moody's to maintain Enron's investment grade credit rating until the merger could be completed. (Cplt. ¶ 690; *see also id.* ¶¶ 65, 389.) Plaintiffs' allegation does not support any inference of improper conduct. Plaintiffs nowhere allege that Mr. Rubin knew of any fraud or misconduct by Enron, or that he did not believe that the company was entitled to an investment grade rating, and there is nothing improper about speaking to a credit rating agency about a client's credit rating.

7. Analysts' Reports

Plaintiffs further allege that Citigroup issued positive analysts' reports on Enron that contained false and misleading statements concerning Enron's business, finances and financial condition and its prospects, all in an effort to inflate Enron's stock price. (Cplt. ¶ 686.)

The complaint does not, however, specifically identify *which* of the statements in *which* of the analysts' reports issued by Citigroup was allegedly false, and it does not explain *why* they were allegedly false. The complaint cites, and purports to quote from, eighteen Citigroup analysts' reports about Enron, issued over a period of almost three years. These allegations are interspersed with (i) more than 100 other purported quotations from analysts' reports issued by other brokerage firms; (ii) selected portions of Enron SEC filings, prospectuses, and press releases; (iii) transcripts of conference calls with Enron executives; and (iv) miscellaneous other sources—comprising, in all, more than 280 numbered paragraphs and almost 150 pages. (Cplt. ¶¶ 109-393; allegations relating to Citigroup analyst's reports are contained in *id.* ¶¶ 123, 133, 163, 166, 169, 186, 227, 244, 249, 259, 267, 304, 308, 326, 327, 335, 370, 375.)

Yet nowhere in these hundreds of paragraphs do plaintiffs identify a single statement in a single Citigroup analysts' report and explain why *that statement* is allegedly false or misleading. Instead, plaintiffs reflexively insert—at regular intervals throughout this part of the complaint—paragraphs alleging, in sweeping, conclusory fashion, that "[e]ach" of the numerous statements made by more than a dozen separate entities "were false and misleading when issued," followed by broad allegations of what plaintiffs claim were the "true but concealed facts . . . ." (*E.g.*, *id.* ¶¶ 155, 214, 300.)

(Thus, for example, paragraph 155 of the complaint alleges that "[e]ach of the statements made between 10/21/98-7/6/99" was false and misleading—a period of almost nine months, and covering approximately thirty separate analysts' reports, registration statements, earnings releases, an annual report, a 10-K, and a conference call with analysts and investors. Paragraph 155, while purporting to explain how those documents were all false and misleading, does not identify or discuss a single one of them.)

Notably, plaintiffs do *not* cite in the complaint any Citigroup analysts' reports after October 19, 2001, because to do so would undermine their contention that Citigroup was at this time desperately trying to prop up Enron and stave off bankruptcy. (*E.g.*, *id.* ¶¶ 688, 690.) That is because, on October 25 and 26, 2001, Citigroup's analyst downgraded his rating of Enron's stock from "Buy, High-Risk" to "Buy, Speculative" and then to "Neutral, Speculative." (Rosen Aff., Exhs. C, D).[5] These downgrades are completely inconsistent with plaintiffs' claim that Citigroup's securities analysts participated in a fraud. If (as plaintiffs allege) Citigroup's securities analysts were conspiring with Enron and with Citigroup's investment bankers in an alleged effort to

[5] In view of the numerous Citigroup analysts' reports about Enron that plaintiffs cite and purport to quote from in the complaint, plaintiffs cannot exclude from the Court's consideration on this motion these other reports, which were also issued during the class period and also relate to Enron. As the Second Circuit stated in similar circumstances, "[p]laintiffs' failure to include [in the complaint] matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision on the motion [to dismiss]." *Cortec Indus., Inc.* v. *Sum Holding, L.P.*, 949 F.2d 42, 44 (2d Cir. 1991). *See also id.* at 48 (holding, in securities fraud action, that district court was entitled to consider documents on motion to dismiss, although they were not incorporated by reference in the complaint or filed with the SEC, where the documents were ones that "plaintiffs had either in [their] possession or had knowledge of and upon which they relied in bringing suit").

keep the Ponzi scheme afloat, then they would not have downgraded Enron's stock in October 2001.

8. Undifferentiated Allegations About "The Banks"

In addition to the allegations specifically relating to Citigroup, the complaint also repeatedly alleges misconduct vaguely attributed to "the banks," "Enron's bankers," or "certain banks," without identifying the specific banks allegedly involved. (*E.g.*, Cplt. ¶¶ 11; 14; 19; 21; 23; 31-33; 48; 53; 57; 70(c); 271; 301; 305; 313-14; 324; 350-51; 360; 433; 617; 619; 621; 628; 630; 651.) For example, the allegations in the complaint relating to participation of the bank defendants in the restructuring of the Raptor partnerships at the end of 2000—among the central allegations in the complaint—fail to identify the specific banks involved, instead asserting broad-brush charges against "Enron's banks" (Cplt. ¶ 33), "certain of Enron's banks" (*id.* ¶ 35), or "[t]he bankers" (*id.* ¶ 619). As we discuss below (pp. 28-40), these generic allegations against groups of defendants, without specific identification of the defendants involved, are inadequate as a matter of law to support a claim of fraud against Citigroup.

C. Plaintiffs' Allegations Against Citigroup Permit No Inference of Scienter

Plaintiffs' effort to show that Citigroup knew that Enron was committing fraud and intentionally or recklessly aided that alleged fraud rests on a series of entirely conclusory allegations unsupported by any specific facts. The complaint nowhere identifies a single instance in which any Citigroup employee learned of any fraudulent conduct by Enron.

Instead, plaintiffs allege broadly that Citigroup somehow must have learned that Enron was falsifying its financial results by virtue of the due diligence it exercised as a lender and underwriter. (Cplt. ¶¶ 650, 689.) Plaintiffs allege that "Citigroup knew that Enron was falsifying its publicly reported financial results" and that Citigroup "obtained this knowledge due to its access to Enron's internal business and financial information as one of Enron's lead lending banks." (*Id.* ¶ 689.) Plaintiffs nowhere allege, however, any facts about the scope of Citigroup's due diligence activities, what Citigroup learned in the course of that due diligence, when it learned it, who learned it, or how the information Citigroup learned led it to conclude that Enron's financial statements were fraudulent.

Plaintiffs further allege, in an equally conclusory manner, that Citigroup's "senior executives . . . constantly interacted with top executives of Enron . . . on an almost daily basis," and allege that Citigroup learned the truth about Enron's business and finances through these "almost daily" contacts. (Cplt. ¶ 675.) (Plaintiffs make nearly identical allegations of "almost daily contact" with Enron's top executives with regard to each of the other eight defendant banks—*id.* ¶¶ 653; 694; 716; 736; 751; 763; 774; 788—suggesting that the top executives of Enron were doing little with their time apart from talking to their bankers.) Plaintiffs describe the contents of the communications with Citigroup in general terms—"Enron's business, financial condition, financial plans, financing needs, its partnerships, SPEs, and Enron's future prospects" (*id.* ¶ 675)—but do not describe any specific discussions or mention any particular plans, financing needs, partnerships, or SPEs. Moreover, plaintiffs provide no facts regarding when these communications took place, who from Citigroup participated in such communications, or why these communications should have made Citigroup aware of Enron's allegedly fraudulent scheme.

Finally, with no factual support whatsoever, plaintiffs allege that "[e]ach of the banks named as defendants knew" that Enron had set up LJM2 to engage in fraudulent, "self-dealing" transactions to permit Enron to generate artificial profit and conceal debt; that it engaged in similar transactions with other SPEs; and that, if Enron's stock price fell below certain triggers, the debt of the SPEs would become recourse to Enron, thereby putting Enron in a "death spiral." (Cplt. ¶¶ 20-35, 646-47, 651.) Plaintiffs allege no facts showing how or when the banks knew these things, or even which bank knew what.

Plaintiffs' allegations of scienter concerning Citigroup's stock analysts are equally conclusory. Plaintiffs allege that "[t]here was no so-called 'Chinese Wall' to seal off the Citigroup securities analysts from the information which Citigroup obtained in rendering commercial and investment banking services to Enron," or, in the alternative, that even if there were information restrictions, the knowledge about Enron allegedly possessed by other Citigroup employees should be imputed to its securities analysts. (Cplt. ¶ 676.) As with their other allegations of scienter, plaintiffs do not identify a single fact that any Citigroup analyst learned, a single communication or document from which he or she learned it, or a single date on which any such facts were allegedly conveyed. (Plaintiffs make the identical allegation, using exactly the same words, with respect to six of the other defendant banks. (*See id.* ¶¶ 654, 695, 717, 737, 764, 775, 789).)

The only motive plaintiffs attribute to Citigroup for assisting Enron in the alleged fraud is the prospect of receiving fees for its underwriting and advisory services and interest and commitment charges for making loans. (*Id.* ¶ 674.) Plaintiffs do not specify the amount of these fees (although they meaninglessly characterize them as "huge," *id.*), and they do not allege that they are anything other (or more) than fees and charges that underwriters and lenders would routinely receive for their services. (Again, as if to punctuate this point, plaintiffs attribute the same motive, in virtually the same words, to each of the other bank defendants. (*See id.* ¶¶ 652, 660, 693, 702, 722, 744, 755, 767, 773, 780, 794).) Plaintiffs also allege that Citigroup or its executives "were permitted to invest $15 million in the very lucrative LJM2 partnership." (*Id.* ¶ 674.) Plaintiffs do not allege what return, if any, Citigroup or its executives earned on that investment, or why the prospect of earning even a "lucrative" return on a $15 million investment would be sufficient to induce Citigroup to lend—and put at risk—Enron hundreds of millions of dollars.

The boilerplate nature of plaintiffs' allegations of scienter regarding Citigroup is underscored by the fact that virtually all such allegations are repeated word-for-word with respect to the other bank defendants. To take just one additional example: plaintiffs allege, in identical or substantially identical words, that *each* of the nine bank defendants "knew" that Enron was falsifying its publicly reported financial results because of its "access to Enron's internal business and financial information as one of Enron's leading banks, as well as its intimate interaction with Enron's top officials which occurred virtually on a daily basis." (Cplt. ¶¶ 670, 689, 713, 733, 748, 760, 771, 784, 798.)

D. Plaintiffs' Allegations of Scienter Also Are Implausible and Contradictory

Plaintiffs' allegations of scienter with respect to Citigroup are not merely insufficiently specific, although they are certainly that. They also defy common sense, and attribute conduct to both Enron and Citigroup that would have been utterly irrational.

To begin with, plaintiffs' allegation that Citigroup learned of Enron's fraudulent financial statements and its enormous losses and "precarious" financial condition (Cplt. ¶¶ 681, 689) through unspecified "due diligence" and "almost daily" contacts with Enron executives (*id.* ¶¶ 675, 689) is implausible on its face. It would have been—to say the least—directly contrary to the interests of Enron and its executives to reveal the truth about the company's alleged fraud to its lenders, including Citigroup, or to permit its lenders to engage in due diligence that would have uncovered the fraud. Even more implausible is plaintiffs' allegation that Enron's executives made the same admissions to *all* of its principal lenders. (*See* p. 21, above.) Plaintiffs do not even purport to explain why Enron would not try to conceal the alleged fraud from its lenders (just as it allegedly hid it from credit agencies, financial journalists, regulatory agencies, and the investing public).

Citigroup's conduct—if the allegations of scienter in the complaint are to be believed—is at least equally inexplicable. The complaint alleges that Citigroup *knew* that Enron's financial statements fraudulently overstated its earnings, that its apparent success was a "grand illusion" (Cplt. ¶ 17), and that its "true financial condition was much more precarious than was publicly known" (*id.* ¶ 689). The complaint alleges further that Enron could not survive unless its stock price remained at artificially high levels, and that, if its stock price declined, price "triggers" would be hit, creating the threat of "a death spiral for Enron." (Cplt. ¶ 46.) In turn, the complaint alleges, Enron could not keep its stock price artificially high without the knowing assistance of numerous insiders, lenders, underwriters, lawyers, and accountants—any one of whom could presumably have blown the whistle on Enron at any time. (*Id.* ¶¶ 17, 642-51, 800-96, 897-905.)

In these circumstances, it would have been utterly irrational for Citigroup to expose itself to the risk of making "hundreds of millions of dollars" in commercial loans to Enron, in addition to more than two billion dollars in prepaid swaps. (*Id.* ¶¶ 680, 684.) No rational lender would engage in such transparently self-destructive behavior merely in the hope of earning routine lending fees and interest. Yet plaintiffs allege that not only Citigroup, but all of the defendant banks, acted in this irrational way.

The 2001 zero coupon convertible note placement provides yet another example of the irrational behavior that plaintiffs attribute to Citigroup. (Cplt. ¶ 288.) According to the complaint, Citigroup and other banks were the initial purchasers of the notes, a total of $1.9 billion worth, and Enron committed to register the notes with the SEC in six months "so the purchasers could resell the notes." (*Id.*) Plaintiffs further allege that, at the time of the offering, Enron "desperately needed" to raise cash, and that the "huge offering was critical to keeping Enron afloat—to keep the Enron Ponzi scheme going." (*Id.*) Thus, according to the complaint, Citigroup and the other banks put themselves at risk for $1.9 billion, *knowing* that Enron was in grave danger of insolvency. While the complaint alleges that some of the banks may have hedged some of this exposure by reselling notes or by selling Enron common stock short, it does not allege that the risk was or could be fully hedged or offer any rational explanation for the banks' willingness to undertake such risk in the first place if they were aware of Enron's true financial condition.

The irrationality of the behavior attributed to Citigroup is further underscored by the contrast with the alleged behavior of Enron's officers and directors. The complaint alleges that Enron's insiders took advantage of the company's artificially high stock price by selling more than a billion dollars of its stock during the class period, particularly when "they knew the scheme was unraveling." (Cplt. ¶¶ 84, 401-16; *see also* Declaration of Scott D. Hakala ("Hakala Decl.").) As plaintiffs and their expert contend, rational investors who knew that the value of Enron was artificially inflated would tend to *reduce* their holdings while the price was inflated; indeed, Dr. Hakala's opinion that Enron's insiders sold on material, non-public information is premised on that assumption.[6] By contrast, plaintiffs allege that Citigroup and the other defendant banks were *increasing* their exposure to Enron by billions of dollars during exactly the same

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[6] For example, Dr. Hakala states:

> A number of the insider trading studies suggest that insiders have a general understanding that their respective companies are over-valued for some period of time prior to a negative disclosure event or prior to a relative decline in their company's stock price. Thus, in order to avoid a possible liquidity problem, *insiders will often begin liquidating their holdings well before the negative earnings trend or underperformance is disclosed to or realized by the market.*

Hakala Decl. ¶ 11 (emphasis added; footnote omitted). Citigroup, of course, does not endorse Dr. Hakala's opinions or concede that he is qualified to offer expert opinions in this case.

period—just the opposite of what a rational lender would do if it knew that Enron was a Ponzi scheme. (*E.g.*, Cplt. ¶ 680.)[7]

In short, the allegations of scienter in the complaint are not just implausible. Instead, they assume that Enron, Citigroup, and the other defendant banks acted at all times in a manner that was utterly irrational and contrary to their own economic self-interest.

E. Facts Relevant to Plaintiffs' 1933 Act Claims

The complaint also asserts claims against Citigroup under Sections 11 and 15 of the Securities Act of 1933 for its participation as an underwriter of an August 10, 1999 offering of Enron 7% Exchangeable Notes (the "7% Notes"). (Cplt. ¶ 1006.)[8] Plaintiffs allege that the Registration Statement and Prospectus for the offering were false

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7 For example, plaintiffs allege that the insider defendants' selling "escalated massively" as "the scheme was unraveling, especially after the termination of the Blockbuster deal" in early March 2001. (Cplt. ¶ 403; *see also id.* ¶ 301 (Enron announced termination of Blockbuster deal on March 9, 2001).) By stark contrast, the complaint alleges that Citigroup and Enron's other lenders made over $5 *billion* in straight loans to Enron (including a $3 billion credit facility to back up commercial paper) after the Blockbuster deal terminated in March 2001. (*Id.* ¶ 680.)

8 Plaintiffs also allege, in paragraph 685, that Citigroup "is also liable for its participation in the resale of the Enron zero coupon convertible notes on and after 7/18/01." In plaintiffs' Third Claim for Relief (setting forth their claims under Sections 11 and 15), however, plaintiffs do not identify Citigroup as a defendant with respect to the zero coupon notes. (Plaintiffs again omitted Citigroup from the revised version of this paragraph submitted with plaintiffs' errata notice. *See* Lead Plaintiff's Notice of Errata and Motion for Entry of Order To Replace Pages In Consolidated Complaint, filed April 15, 2002.) Moreover, plaintiffs' Third Claim for Relief does not incorporate by reference paragraph 685, or any other paragraph alleging that Citigroup was involved with the sale of the zero coupon notes. Accordingly, it does not appear that plaintiffs seek to assert a 1933 Act claim against Citigroup in connection with the sale of these notes.

and misleading (Cplt. ¶ 1007), and that the underwriters did not make reasonable and diligent investigations of the statements contained therein (*id.* ¶ 1013).

Plaintiffs do not allege that they relied on the prospectus or the registration statement for the 7% Notes. This is not surprising, because the one plaintiff who is alleged to have purchased these securities, Murray van de Velde (*id.* ¶ 1006), did so on November 5 and November 9, *2001*—more than two years *after* the registration statement for the notes became effective in August 1999. (*See* Plaintiff's Certification of Securities Fraud Class Action Complaint, dated as of December 20, 2001 (Rosen Aff., Ex. E).)

Moreover, any allegation that Mr. van de Velde relied on the prospectus in making his purchases would be far-fetched. The prospectus was filed in 1999 and incorporated Enron's financial data from 1997 and 1998. (*Id.*, Ex. F.) By November 1, 2001, Enron was already the target of a number of securities fraud and shareholder derivative lawsuits, which alleged that its public disclosures were materially misleading; it was the subject of a formal SEC investigation into its accounting practices (Rosen Aff., Ex.G); and Moody's had downgraded all of Enron's long-term debt ratings (*id.* Ex. H). Moreover, on November 8, 2001, Enron filed its Form 8-K announcing that it would be restating its financial statements dating back to 1997, and specifically warning investors that those earlier financial statements—including those incorporated in the 7% Notes prospectus—*should not be relied upon.* (*Id.*, Ex. I, at 1.) In light of the ample bad news about Enron that was published in the days and weeks before his purchases, and in light of the fact that Enron specifically told him *not* to rely on those financial statements, Mr.

van de Velde cannot plausibly claim that he nevertheless purchased the notes in reliance on the three- and four-year-old financial statements incorporated in the prospectus.

ARGUMENT

I.

THE COMPLAINT FAILS TO PLEAD FRAUD WITH THE PARTICULARITY REQUIRED BY THE PSLRA AND RULE 9(b)

The Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 78u-4 *et seq.*, and Rule 9(b) of the Federal Rules of Civil Procedure require plaintiffs asserting fraud claims under the federal securities laws, including claims, such as those here, under Section 10(b) and Rule 10b-5, to allege the specific time, place, and contents of allegedly false representations, the identity of the speaker, and an explanation of why the statements were fraudulent. *Nathenson* v. *Zonagen, Inc.*, 267 F.3d 400, 412 (5th Cir. 2001); *Kurtzman* v. *Compaq Computer Corp.*, Civil Action No. H-99-779, slip op. at 16 (S.D. Tex. March 30, 2002) (Harmon, J.).

The PSLRA also requires plaintiffs to plead "particularized facts giving rise to a strong inference of scienter." *Nathenson*, 267 F.3d at 412; *see also Kurtzman,* slip op. at 16-17, 43.[9] Plaintiffs may not rely on conclusory allegations, but must plead specific facts that "constitute persuasive, effective, and cogent evidence from which it

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[9] The PSLRA provides in relevant part as follows:

[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts upon which that belief is formed.

. . .

[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u-4(b).

can logically be deduced that defendants acted with intent to deceive, manipulate, or defraud." *Coates* v. *Heartland Wireless Communications, Inc.*, 100 F. Supp. 2d 417, 422 (N.D. Tex. 2000); *see also Collmer* v. *U.S. Liquids, Inc.*, Civil Action No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *75 (S.D. Tex. Jan. 23, 2001) (Harmon, J.) (under Rule 9(b), plaintiff must plead "specific facts" to support an inference of scienter); *In re Sec. Litig. BMC Software, Inc.,* 183 F. Supp. 2d 860, 895 (S.D. Tex. 2001) (Harmon, J.) (same). In this Circuit, allegations of motive and opportunity, standing alone, will almost never satisfy the scienter pleading requirement. *Nathenson*, 267 F.3d at 411-12; *Kurtzman*, slip op. at 43. Finally, where—as here—the complaint is not pleaded on personal knowledge, the complaint must state the facts on which plaintiffs rest their belief that defendants committed fraud. 15 U.S.C. § 78u-4(b)(1); *In re Sec. Litig. BMC Software*, 183 F. Supp. at 885 n.33.[10]

[10] The requirements of the PSLRA for pleading scienter with specificity are more stringent than the parallel requirements under Rule 9(b). Under Rule 9(b), a plaintiff must plead facts that "merely 'support an inference of fraud,'" whereas the PSLRA requires the plaintiff to demonstrate a "strong inference." *Nathenson*, 267 F.3d at 407. Moreover, under Rule 9(b), a plaintiff can satisfy the requirement of alleging "specific" facts supporting an inference of scienter by alleging facts showing that defendant had a motive and opportunity to commit fraud, *id.* at 409; under the PSLRA, motive and opportunity, standing alone, are unlikely to raise the necessary strong inference of scienter. *Id.* at 412; *see also Zishka* v. *American Pad & Paper Co.*, No. Civ. A. 398CV0660M, 2001 WL 1645500, at *1-2 (N.D. Tex. Dec. 20, 2001). As the courts have recognized, however, pre-PSLRA case law regarding the sufficiency of motive under Rule 9(b) remains relevant in the PSLRA context: "Allegations of motive and opportunity held previously to the PSLRA to be insufficient to allow a proper inference of scienter . . . would presumably continue to be insufficient." *Nathenson*, 267 F.3d at 412 (citations omitted); *see also In re Azurix Corp. Sec. Litig.*, No. H-00-4034, 2002 WL 562819, at *22 (S.D. Tex. Mar. 21, 2002).

These stringent pleading requirements "serve[] an important screening function in securities fraud suits." *Melder* v. *Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994). They "provide[] defendants with fair notice of the plaintiffs' claims, protect[] defendants from harm to their reputation and goodwill, reduce[] the number of strike suits, and prevent[] plaintiffs from filing baseless claims and then attempting to discover unknown wrongs." *Id.* (citation omitted), quoted in *Kurtzman*, slip op. at 16. As this Court has stressed, the PSLRA pleading rules seek to "assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *In re Landry's Seafood Restaurant, Inc. Sec. Litig.*, No. H-99-1948, slip op. at 37 (S.D. Tex. Feb. 20, 2001) (Harmon, J.) (quoting *Ackerman* v. *Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999)).

Courts—including, specifically, the Fifth Circuit and this Court—repeatedly have applied the PSLRA and Rule 9(b) to dismiss, at the pleading stage, claims of securities fraud against lenders, underwriters, and other outsiders based—just like those here—on conclusory allegations of participation in fraud by corporate issuers. *See, e.g., Melder*, 27 F.3d at 1104 (affirming dismissal under Rule 9(b) of securities fraud claims against underwriter defendants on the grounds that the complaint did not allege circumstances "indicat[ing] conscious behavior on the part of the defendant[s]"); *In re Landry's Seafood*, slip op. at 65-66 (dismissing Section 10(b) claims against underwriters for failure to allege facts giving rise to a strong inference of scienter); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1410-11 (9th Cir. 1996) (affirming dismissal, on Rule 9(b) grounds, of claims against underwriters where scienter was insufficiently pleaded), *cert. denied sub nom. Anderson* v. *Clow*, 520 U.S. 1103 (1997); *Abbell Credit Corp.* v. *Bank of*

America Corp., No. 01 C2227 2002 WL 335320, at *4-5 (N.D. Ill. March 1, 2002) (dismissing Section 10(b) and Rule 10b-5 claims against underwriter and brokerage subsidiary based upon allegedly fraudulent recommendation of issuer's securities by subsidiary, on the ground, among other things, that underwriter's status did not create inference of knowledge about allegedly undisclosed financial instability of issuer); *UBS Asset Mgmt. (New York) Inc.* v. *Wood Gundy Corp.*, 914 F. Supp. 66, 71 (S.D.N.Y. 1996) (dismissing securities fraud claims against broker-dealer because, *inter alia*, complaint did not allege facts showing that defendant knew or recklessly disregarded falsity of statements made by issuer); *In re Urcarco Sec. Litig.*, 148 F.R.D. 561, 568-69 (N.D. Tex. 1993) (rejecting fraud claims against underwriter where the complaint "lump[ed]" defendants together in alleging scienter and accused underwriters of participating in the supposed fraud merely to obtain fees).

In this case, as we now show, the complaint fails to comply with the PSLRA and Rule 9(b) for several reasons. First, it does not adequately identify the alleged misrepresentations for which it alleges Citigroup is responsible, or explain how and why each such statement is allegedly false. Second, plaintiffs' conclusory and boilerplate allegations of scienter are insufficient. Third, plaintiffs' claims are inherently implausible—and should therefore be scrutinized with particular care—because the conduct by Citigroup alleged in the complaint would have been irrational and contrary to Citigroup's economic self-interest. For these reasons, plaintiffs' claims against Citigroup under Sections 10(b) and Rule 10b-5 should be dismissed.

A. The Complaint Does Not Adequately Allege Misstatements By Citigroup

To begin with, the complaint entirely fails to satisfy the fundamental requirement under the PSLRA and Rule 9(b) that it specifically identify the alleged misstatements; allege, with respect to each alleged misstatement, the precise nature of the statement and why it was false or misleading; and state the facts on which plaintiffs base their purported belief that defendants committed fraud.

First, with respect to the statements actually attributed to Citigroup—*i.e.*, the statements by Citigroup's analysts—the complaint utterly fails either to identify *which* of these statements is allegedly misleading or to "specify the reasons why *each* statement is alleged to have been misleading." *Wenger* v. *Lumisys, Inc.*, 2 F. Supp. 2d 1231, 1243 (N.D. Cal. 1998) (emphasis in original); *see also Nathenson*, 267 F.3d at 412 (complaint must "explain why the statements were fraudulent") (quoting *Williams* v. *WMX Technologies, Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)).

Faced with pleading tactics similar to those here, the court in *Wenger* dismissed the complaint for failure to specify the allegedly misleading statements and the reasons that each statement was misleading. The court held that the PSLRA was violated by a complaint that—just as the complaint does here—merely quoted numerous allegedly misleading statements and then alleged a "laundry list of reasons why *all* the statements were allegedly false when made." *Wenger*, 2 F. Supp. 2d at 1243 (emphasis in original); *see also Capri Optics Profit Sharing* v. *Digital Equip. Corp.*, 950 F.2d 5, 8 (1st Cir. 1991) (plaintiffs should not burden court with task of matching statements to omissions); *Ruble* v. *Rural/Metro Corp.*, No. CV-99-0822-PHX, 2001 WL 1772319, at *10 (D. Ariz. Jan. 26, 2001) ("[P]laintiffs' first amended complaint contains public statements that are alleged to be misleading. It also contains the repeated laundry list of alleged true circumstances. But, what is largely missing is the nexus between the two, an explanation of what it was about the alleged true facts that made the public statements misleading."); *Collmer*, 2001 U.S. Dist. LEXIS 23518, at *93 (dismissing complaint drafted in similar "laundry list" fashion); *In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp. 2d 833, 840-41 (N.D. Cal. 2000) (same); *In re Oak Tech. Sec. Litig.*, No. 96-205525W, 1997 WL 448168, at *4-5 (N.D. Cal. Aug. 1, 1997) (same).

Second, plaintiffs' allegations with respect to the statements made by Enron and other defendants apart from Citigroup are even less sufficient. The complaint purports to quote from more than two hundred such statements over a period of more than three years, including statements in Enron's SEC filings; press releases by Enron; statements by Enron executives in telephone conferences with analysts; newspaper and magazine articles; and reports issued by analysts at other brokerage firms. (Cplt. ¶¶ 106-388.) The complaint, however, does not identify which, if any, of these statements is attributable to Citigroup, which of these statements Citigroup was allegedly involved in preparing, or which if any of them Citigroup allegedly knew was false.

These allegations utterly fail to comply with the PSLRA or Rule 9(b), because they do not identify the specific role played by each defendant, if any, in issuing each allegedly misleading statement. *In re Stac Elecs.*, 89 F.3d at 1411 ("[B]ecause the roles of the underwriter, outside director, and venture capital defendants in propounding the allegedly fraudulent statements are left unspecified, it follows that Plaintiffs have not met the specificity requirements of Rule 9(b)."). So too here.

Finally, plaintiffs also do not satisfy the requirement under the PSLRA applicable to fraud allegations that are not pleaded on personal knowledge that they identify the facts on which they base their belief that Citigroup committed fraud. *See In re Sec. Litig. BMC Software*, 183 F. Supp. at 885 n.33 (holding that this particularized pleading requirement applies to allegations based on "investigation of counsel," even where plaintiff does not specify that it is pleading on information and belief); *In re Landry's Seafood*, slip op. at 55-57 (same).

B. The Complaint Does Not Allege Facts Showing That Citigroup Acted With Scienter

The conclusory allegations of the complaint also do not even remotely satisfy the standards of Rule 9(b) or the PSLRA for pleading scienter.

First, plaintiffs' conclusory allegation that Citigroup knew of Enron's true financial condition, without identifying any specific sources of such information, does not comply with the PSLRA or Rule 9(b). Plaintiffs are required to allege specific facts—names, dates, documents, contents of communications—showing that the defendant had such knowledge. Absent such specific allegations, the claim should be dismissed. *See In re Stac Elecs.*, 89 F.3d at 1410 (affirming dismissal under Rule 9(b) of fraud claims against underwriters based on allegations that underwriters schemed with issuer to issue false reports where the complaint "provides no specific facts—no names, no meetings, no internal memoranda or documents, no specific conduct or statement—in support of its theory"); *Devaney* v. *Chester*, 813 F.2d 566, 568 (2d Cir. 1987) (affirming dismissal of securities fraud claims under Rule 9(b) where the "complaint does not allege any facts to suggest who at Salomon Brothers possessed such knowledge, when and how they obtained the knowledge, or even why anyone at Salomon Brothers should have known that the views expressed in the prospectus did not represent the true beliefs of AMI management"); *In re Azurix Corp.*, 2002 WL 562819, at *54 (allegation that "former employees [of the issuer] . . . confirmed defendants' actual knowledge of the false and misleading statements alleged herein when made" was insufficient to support allegation of scienter, where plaintiffs "fail to explain who these 'former employees' are . . . , what positions in the company these employees held, and which exact misrepresentations they were confirming"); *Kurtzman*, slip op. at 93 ("[G]eneric, conclusory allegations, unsupported by sufficient specific facts, do not raise any strong inference" of scienter); *In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d at 886 (dismissing fraud allegations because plaintiffs failed to "specifically plead what [each defendant] learned, when he learned it, and how Plaintiffs know what he learned"); *In re Landry's Seafood*, slip op. at 66 (same).

Here, the complaint nowhere identifies *any* specific communications by which Citigroup allegedly learned the truth about Enron, never identifies anyone at Citigroup who possessed such knowledge, and never specifies when they obtained it. Such broad, undifferentiated allegations of scienter are insufficient as a matter of law.

Second, plaintiffs' conclusory allegations that Citigroup acted as an underwriter or lender to Enron, and therefore somehow must have learned of Enron's alleged fraud through its "due diligence," are equally insufficient. *See In re Landry's Seafood*, slip op. at 32, 50-51 (holding that plaintiffs did not create an inference of scienter through allegations that underwriters "conducted a due diligence investigation . . . , had intimate access to [the issuer's] confidential corporate information, and constantly communicated" with upper management); *Melder*, 27 F.3d at 1104 (affirming dismissal of claims against auditors based on allegation that "[i]n the course of rendering [auditing] services to [the issuer]," the auditor "either obtained knowledge of, or recklessly disregarded, the facts alleged herein"); *Schiller* v. *Physicians Resource Group, Inc.*, No. Civ. A. 3:97-CV-3158-L, 2002 WL 318441, at *15-16 (N.D. Tex. Feb. 26, 2002) (allegation that auditors had knowledge of "red flags" for fraud based on participation in "audits and reviews," provision of "consulting services," and review of public documents was insufficient to raise a strong inference of fraudulent intent); *In re WRT Energy Sec. Litig.*, Nos. 96 Civ. 3610 (JFK), 96 Civ. 3611 (JFK), 1997 WL 576023, at *13 (S.D.N.Y. Sept. 15, 1997) (allegation that due diligence investigation should have uncovered asserted improprieties is insufficient to satisfy Rule 9(b)); *Eickhorst* v. *American Completion & Dev. Corp.*, 706 F. Supp. 1087, 1093-94 (S.D.N.Y. 1989) (same).

As these courts have recognized, to permit an inference of scienter based on "routine components of underwriting services would effectively eliminat[e] the scienter requirement as to securities underwriters," because the same allegations could be made about any such defendant. *Wenger*, 2 F. Supp. 2d at 1251-52 (internal quotation marks omitted). Rather, plaintiffs must establish the existence of such knowledge contemporaneous with the allegedly fraudulent statements by pleading "specific references to specific facts." *Id.* at 1250; *see also Lovelace* v. *Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996) (plaintiff must set forth "specific facts"); *Coates*, 100 F. Supp. 2d at 432 n.15 (same); *cf. DSAM Global Value Fund* v. *Altris Software, Inc.*, No. 00-56848, 2002 WL 598417, at *3-4 (9th Cir. April 19, 2002) (allegation that auditor had access to documents that raised "red flags" concerning accounting irregularities was not enough to create strong inference of knowledge or recklessness).[11]

Third, knowledge of fraud also cannot be inferred from broad allegations that high-level Citigroup employees allegedly had regular contact with Enron employees—allegations that could be made about virtually any underwriter or lender. *See Kurtzman*, slip op. at 46-47 (noting that plaintiffs could not rely on alleged reports and meetings to establish a strong inference of scienter when plaintiffs failed to state "any single discussion at any monthly meeting" and "fail[ed] to allege with any specificity the actual contents of these claimed sources of information"); *see also In re Stac Elecs.*, 89 F.3d at 1410 (same); *In re Sec. Litig. BMC Software*, 183 F. Supp. 2d at 887 (plaintiffs cannot rely on general averments of involvement in business of issuer, contacts with management, or access to internal corporate documents, but must "provide details about alleged negative internal reports, when they were prepared, who prepared them, their content, the sources from who plaintiffs obtained such information, etc."); *In re Landry's Seafood*, slip op. at 65-66 (plaintiffs cannot create an inference of scienter on the basis of contact with the issuer's management if they fail "to provide any details or identify specifically what kind of information, when it was conveyed, by whom and to whom").

[11] *See also In re Stac Elecs.*, 89 F.3d at 1410-11; *Melder*, 27 F.3d at 1104; *Devaney*, 813 F.2d at 568; *In re Urcaro*, 148 F.R.D. at 568-69; *Marks* v. *Simulation Scis.*, No. SA CV98546GLT, 2000 WL 33115589, at *2 (C.D. Cal. Feb. 28, 2000); *In re Stratosphere Corp. Sec. Litig.*, 1 F. Supp. 2d 1096, 1121-22 (D. Nev. 1998); *Schoenhaut* v. *American Sensors, Inc.*, 986 F. Supp. 785, 795-96 (S.D.N.Y. 1997); *In re WRT Energy*, 1997 WL 576023, at *12-13.

Fourth, plaintiffs' allegation that Citigroup was motivated to commit fraud in order to obtain underwriting and professional service fees and interest on loans is equally inadequate. (*See* Cplt. ¶¶ 674, 683, 686, 690.) To begin with, as noted (p. 29, above), under the PSLRA, motive and opportunity are insufficient to plead scienter. Moreover, as a matter of law, the allegation that a professional committed fraud to obtain fees does not give rise to an inference of scienter. To permit such "generic" allegations to satisfy the scienter requirement "would make a mockery of Rule 9(b) by effectively eliminating the scienter requirement as to securities underwriters since all underwriters are, of course, fee seekers." *Melder*, 27 F.3d at 1104. (Indeed, as noted (p. 21, above), plaintiffs in fact attribute the same motive to each of the nine bank defendants.) *See also, e.g.*, *In re Urcarco*, 148 F.R.D. at 569 (holding that to accept "they did it for the money" as a sufficient explanation would "endorse a nihilistic approach to Rule 9(b) jurisprudence" and "pare the pleading requirement for state of mind down to nothingness"); *Schiller*, 2002 WL 318441, at *9 (rejecting "boilerplate, generic allegations" that could be alleged against any firm in the audit and consulting business, including a motive to earn fees and increase market share); *In re WRT Energy*, 1997 WL 576023, at *12 (allegation that underwriters were motivated by possibility of increased fees insufficient to establish scienter).[12]

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[12] *See also Vogel* v *Sands Bros. & Co.*, 126 F. Supp. 2d 730, 739 (S.D.N.Y. 2001) (allegations that underwriter "desire[d] to realize greater transaction fees" and had "close relationship" with the issuer were not sufficient to establish improper motive); *Collmer*, 2001 U.S. Dist. LEXIS 23518, at *77-78, *88-89 (general motives possessed by all corporate insiders are insufficient to raise a strong inference of scienter under Rule 9(b) or the PSLRA); *In re Stratosphere*, 1 F. Supp. 2d at 1122 (insufficient to allege motives possessed by every securities analyst or underwriting firm to issue favorable research reports, including the desire to make a market in

(. . . continued)

Fifth, plaintiffs have failed to plead scienter with respect to any fraud claims based on the reports issued by Citigroup's securities analysts. Plaintiffs allege that any information obtained by employees working in Citigroup's commercial and investment banking divisions must be imputed to the securities analysts because, they say, either no "Chinese Wall" existed between the analysts and bankers or, if one did exist, it was insufficient to prevent imputation of knowledge. (Cplt. ¶ 676.) But, as shown above, plaintiffs have entirely failed to plead any facts to support their allegation that anyone at Citigroup had information from Enron from which it could conclude that the reports about Enron issued by Citigroup's securities analysts were in any way false or misleading.

These allegations, as a matter of law, are insufficient to plead scienter with respect to any of Citigroup's analysts' reports. *See Marks* v. *Simulation Sciences*, No. SA CV98546GLT, 2000 WL 33115589, at *2 (C.D. Cal. Feb. 28, 2000) (allegations that analysts had "intimate access" to internal documents and personnel insufficient to raise inference that firm should have known statements in the analysts' report were false); *In re Autodesk,* 132 F. Supp. 2d at 845 (conclusory allegation that securities analyst "knew" that information he had received from the company was false was insufficient to allege

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(continued . . .)

securities and earn higher fees); *Wenger*, 2 F. Supp. 2d at 1251-52 (permitting scienter based on "routine components of underwriting services would 'effectively eliminat[e]' the scienter requirement as to securities underwriters") (citation omitted); *McNamara* v. *Bre-X Minerals Ltd.*, 57 F. Supp. 2d 396, 423 (E.D. Tex. 1999) (underwriter's alleged motive "to ingratiate itself with Bre-X, to collect professional fees for its advisory position, and to enhance its business reputation" is insufficient to show scienter).

fraud); *Wenger,* 2 F. Supp. 2d at 1251 (fraud claim against underwriter dismissed for failure to allege facts demonstrating knowledge of "adverse" information at time of allegedly false statements); *In re Stratosphere Corp.*, 1 F. Supp. 2d at 1121-22 (role as lead underwriter and access to company's top executives insufficient from which to infer knowledge that securities analysts' reports issued by the underwriter were false or misleading); *In re Oak Tech. Sec. Litig.*, 1997 WL 448168, at *14 (fraud claim dismissed for failure "to cite specifically any internal documents or other contemporaneous facts" to indicate that brokerage firm did not believe projections in its analysts' reports); *In re Valence Tech. Sec. Litig.*, No. C 95-20459 JW, 1996 WL 37788, at *7-8, 12 (N.D. Cal. Jan 23, 1996).

For example, in *McNamara* v. *Bre-X Minerals, Ltd.*, 57 F. Supp. 2d 396 (E.D. Tex. 1999), the court dismissed, on Rule 9(b) grounds, claims against securities analysts who recommended the stock of Bre-X, a mineral exploration company. Plaintiffs alleged that Bre-X fraudulently overstated its estimates of gold deposits at a gold mine site that was its principal asset. *Id.* at 402. Plaintiffs further alleged that the analysts knew there was no gold at the site because they had made visits to the site, had access to an engineer's negative test results, and were "in constant communication" with Bre-X's top officers. *Id.* at 420-21. The court held that these allegations were insufficiently specific to support a strong inference of scienter, because they did not state when the site visits were made, what the analysts observed at the site, when and how they learned of the test results, or how the plaintiffs know those facts. *Id.* (By contrast, the court later upheld the pleading against one analyst where the plaintiffs identified specific internal Bre-X documents, unavailable to the other analysts, that showed the gold strike might not be genuine, and because that analyst allegedly held over a million shares of Bre-X stock himself. *McNamara* v. *Bre-X Minerals, Ltd.*, No. 5:97-CV-159, 2001 WL 732017, at *63-64 (E.D. Tex. Mar. 30, 2001)). The allegations of Citigroup's scienter in this case are far less detailed than the allegations of scienter that were held insufficient in *Bre-X* and the other cases cited above.

Finally, many of the Citigroup analysts' reports cited in the complaint merely offered the analysts' recommendations or opinions, or forecasts of Enron's future performance. (*See, e.g.*, Cplt. ¶¶ 304, 308, 326.) As a matter of law, the expression of an analysts' subjective opinion is not actionable. *See, e.g., Nathenson*, 267 F.3d at 417 n.15 (mere optimistic generalizations or puffing not actionable); *Kurtzman*, slip op. at 52 ("Vague optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions."). Moreover, under the PSLRA, forecasts and other forward-looking statements also are not actionable absent well-pleaded allegations—which have not been made here—that the analyst had actual knowledge that it was false or misleading. *E.g., In re Sec. Litig. BMC Software*, 183 F. Supp. 2d at 881 n.28.[13]

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[13] To the extent that Citigroup's analysts merely repeated information in their reports that was obtained from Enron, the reports expressly disclosed that Enron was the source, and further warned readers that Citigroup had not independently verified that information. For example, the report cited by plaintiffs at paragraphs 327 and 686 of the complaint stated: "Although information has been obtained from and is based upon sources SSB believes to be reliable, we do not guarantee its accuracy and it may be incomplete or condensed." June 7, 2001 Analyst Report re Enron Corporation (Rosen Aff., Exh. J), at 3.

C. The Implausible Nature of Plaintiffs' Claims Further Weighs Against Any Inference of Scienter

The pleading deficiencies catalogued above are particularly glaring because the entire scheme alleged by plaintiffs assumes that Citigroup acted irrationally and against its own economic self-interest, by lending hundreds of millions of dollars to Enron at a time it allegedly knew that Enron was nothing but a Ponzi scheme.

The PSLRA and Rule 9(b) do not permit a "strong inference of scienter" to be based on ascribing irrational behavior to the defendant. *See, e.g.*, *Wenger*, 2 F. Supp. 2d at 1252 (rejecting as "fundamentally questionable" allegation that underwriter would market an IPO knowing the stock's value would soon fall); *Coates* v. *Heartland Wireless Communications, Inc.*, 55 F. Supp. 2d 628, 643 (N.D. Tex. 1999) (rejecting, as basis for scienter allegation, alleged motive that "defies common sense" and "is facially implausible"); *see also Kalnit* v. *Eichler*, 264 F.3d 131, 140-41 (2d Cir. 2001) ("[W]here plaintiff' s view of the facts defies economic reason, it does not yield [even] a reasonable inference of fraudulent intent."); *In re Sun Healthcare Group, Inc. Sec. Litig.*, 181 F. Supp. 2d 1283, 1297 (D.N.M. 2002) ("It is difficult to discern how Defendants could be acting in their self-interest by holding or purchasing artificially inflated Sun stock, as well as acquiring a company that they allegedly knew was doomed for failure under PPS. Motive, therefore, is entirely absent from Plaintiffs' Complaint."); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) (to permit inference of scienter, plaintiffs must aver "factual allegations that make their theoretically viable claim plausible").

In examining allegations of scienter, the courts assume that firms act in their own "informed economic self-interest." *Shields* v. *Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1125 (2d Cir. 1994). In this case, the potential losses Citigroup would have suffered from knowingly lending hundreds of millions of dollars to a borrower engaged in a Ponzi scheme dwarfed any conceivable potential benefits it might have gained. Moreover, inferring fraudulent intent from fee-seeking is irrational among professionals that have relatively little to gain from the fraud, but are exposed to enormous liability and financial loss. *See, e.g.*, *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) ("One who believes that another has behaved irrationally has to make a strong case"; court will not presume auditor would intentionally assist client's fraud merely to obtain fees); *In re WRT Energy*, 1997 WL 576023, at *12 (underwriter unlikely to risk its reputation to generate fees amounting to a small percentage of its annual revenues); *Collmer*, 2001 U.S. Dist. LEXIS 23518 at *91 (concluding that plaintiffs provided "no credible reason why Defendants would scheme to raise the price of stock by violating environmental laws in a manner at the risk of enormous criminal and civil liability").

In sum, plaintiffs do not plead any specific facts creating the "strong inference of scienter" required by the PSLRA. Accordingly, their claims under Section 10(b) and Rule 10b-5 should be dismissed.

II.

PLAINTIFFS' PRINCIPAL CLAIMS AGAINST CITIGROUP IN EFFECT CHARGE CITIGROUP WITH AIDING AND ABETTING ENRON'S VIOLATIONS OF SECTION 10(b) AND ARE THEREFORE BARRED BY *CENTRAL BANK*

Plaintiffs' Section 10(b) claims against Citigroup based upon the financing, underwriting, and investment banking services it provided to Enron should be dismissed for a second, independent reason as well. Plaintiffs claim, in substance, that Citigroup aided and abetted violations of Section 10(b) by Enron. Under the Supreme Court's decision in *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164 (1994), however, there is no private right of action for aiding and abetting a violation of Section 10(b). For that reason, too, plaintiffs' Section 10(b) claims should be dismissed.

A. Under *Central Bank*, Private Plaintiffs Cannot Sue For Aiding and Abetting A Violation of Section 10(b)

In *Central Bank*, the Supreme Court held that there is no private civil liability for aiding and abetting a violation of Section 10(b). Relying principally on the plain language of the statute, the Court reasoned that "the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act. The proscription does not include giving aid to a person who commits a manipulative or deceptive act." 511 U.S. at 177 (internal citations omitted).

The Court in *Central Bank* further reasoned that this result was consistent with the structure of private civil claims under the securities laws. By analogy, it noted, Congress did not impose aiding and abetting liability under any of the express private rights of action under the securities laws, and thus likely would not have attached such liability to a private cause of action under Section 10(b). *Id.* at 178-80. In addition, the Court pointed out, Congress has never enacted a general civil aiding and abetting statute, but has taken a statute-by-statute approach concerning the imposition of such liability. *Id.* at 180-85.

Finally, the Court reasoned that recognizing a private right of action for aiding and abetting would disserve important goals of the securities laws. First, it noted, "the rules for determining aiding and abetting liability are unclear," and thus imposing such liability would result in "decisions 'made on an ad hoc basis, offering little predictive value' to those who provide services to participants in the securities business." *Id.* at 188 (quoting *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988)). Moreover, litigation under Section 10(b) "requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements." *Id.* at 189. Thus, recognizing a civil action for aiding and abetting would have the "ripple effect[]" of making securities professionals less willing to provide advice to "newer and smaller companies," and imposing litigation and settlement costs that may be passed on to issuers, and, in turn, to investors, "the intended beneficiaries of the statute." *Id.*

B. Plaintiffs' Claims Against Citigroup Fail Under the "Bright Line" Test

Since *Central Bank,* all but one of the Circuits to have addressed the issue have held that a defendant may not be held liable as a primary violator under Section 10(b) unless that defendant directly made the misrepresentation upon which the plaintiff relied. *See Ziemba* v. *Cascade Int'l, Inc.* 256 F.3d 1194, 1205-06, 1207 (11th Cir. 2001); *Wright* v. *Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998); *Anixter* v.

Home-Stake Prod. Co., 77 F.3d 1215, 1225-26 (10th Cir. 1996); *see also In re Kendall Square Research Corp. Sec. Litig.*, 868 F. Supp. 26, 28 (D. Mass. 1994); *Vosgerichian* v. *Commodore Int'l*, 862 F. Supp. 1371, 1377-78 (E.D. Pa. 1994). Moreover, the representation must be attributed directly to that defendant when it is disseminated to the public. *Wright*, 152 F.3d at 175; *see also Ziemba*, 256 at 1205 (statement must have been publicly attributed to defendant at time of plaintiff's investment decision).

Under this so-called "bright line" test, assisting another in the making of a misstatement does not give rise to primary liability in a private civil suit under Section 10(b). *Ziemba*, 256 F.3d at 1205-06, 1207 (affirming dismissal of Section 10(b) claims against issuer's accountants and lawyers because the claims arose from their private advice to issuer, not their public statements); *Wright*, 152 F.3d at 176 (affirming dismissal of Section 10(b) claim against issuers' accountant where accountant had not made any public statements; "secondary actors . . . may no longer be held primarily liable under § 10(b) for mere knowledge and assistance in the fraud"); *Shapiro* v. *Cantor*, 123 F.3d 717, 721 (2d Cir. 1997) ("Plaintiffs' argument is . . . that the [accountant] defendants were in complicity throughout with the principal defendants. This assertion of aiding and abetting does not support a claim under § 10(b) . . . ."); *see also Advanced Laser Prods., Inc.* v. *Signature Stock Transfer, Inc.*, No. Civ. A.3:98-CV-1624-D, 1999 WL 222385, *2 n. 2 (N.D. Tex. Apr. 12, 1999) ("To the extent that [plaintiff] alleges that [defendant] 'acted in complicity' with [a third party's] theft of securities, [plaintiff] has failed to assert an act that violates § 10(b) and Rule 10b-5. . . . To be liable under § 10(b), [defendant] must have directly committed a manipulative or deceptive act."); *Cogan* v. *Triad Am. Energy*, 944 F. Supp. 1325, 1337 (S.D. Tex. 1996) ("An individual investor may not sue someone for helping the issuer sell a security through having furnished a service to the issuer.").

Thus, for example, in *Vosgerichian,* an investor in defendant Commodore brought suit under Section 10(b) against Commodore and its accountants, Arthur Andersen, alleging misrepresentations and accounting improprieties in connection with various transactions. The court held that the complaint stated a claim against Andersen based upon the audit opinion it rendered, but not upon its accounting advice to the company. *Vosgerichian*, 862 F. Supp. at 1378. In light of *Central Bank*, the court held that, other than the audit opinion, "[e]ach and every misrepresentation alleged was made by Commodore. Plaintiff's allegations against AA do not go beyond allegations that AA assisted Commodore in perpetrating securities fraud and are thus not cognizable." *Id.*

So too here. Plaintiffs allege only that Citigroup provided commercial or investment banking services to Enron, and such allegations at most state a claim for aiding and abetting. *See, e.g.*, *Cogan*, 944 F. Supp. at 1328-31, 1337 (investors could not state claim against bank that assisted issuer by lending money to investors to purchase securities and that took security interest in investment in issuer).[14]

Similarly, plaintiffs' allegations that Citigroup helped structure or finance certain partnerships or transactions fail to state a claim. (Cplt. ¶¶ 674, 675, 684, 687.)

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[14] Despite plaintiffs' allegation to the contrary (Cplt. ¶¶ 685, 692), any prospectuses or registration statements issued in connection with Enron securities for which Citigroup was an underwriter do not qualify as statements made by Citigroup. *See In re VMS Sec. Litig.*, 752 F. Supp. 1373, 1394 & n.18 (N.D. Ill. 1990) (underwriters could not be held primarily liable for alleged misstatements in prospectus they helped prepare). As the *VMS* court reasoned, the underwriters and other advisors ultimately are "not responsible for issuing the prospectuses . . . ." *Id.* at 1394.

"[P]articipation in the 'structuring' [of a transaction] does not constitute the making of a material misstatement" under the bright line test. *In re Kendall Square*, 868 F. Supp. at 28 n.1. As the cases cited above make clear, Citigroup cannot be held liable for any alleged assistance it rendered to Enron, where it did not itself make any allegedly fraudulent statements.

C. Plaintiffs' Claims Also Fail The "Substantial Participation" Test

The Ninth Circuit and some district courts have adopted a different test for determining whether alleged conduct by a secondary actor gives rise to primary liability. Under the Ninth Circuit test, such a defendant may be held liable if it substantially participated in the making of the allegedly misleading statement. *See In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994) (as amended Mar. 13, 1995) (outside accounting firm may be held liable for alleged misrepresentations in letter from issuer to SEC, where firm was alleged to have played a "significant role" in drafting the letter, and the letter itself stated that it had been drafted after "extensive review and discussions" with the accounting firm and referred the SEC to two of the firm's partners for further information); *Cashman* v. *Coopers & Lybrand*, 877 F. Supp. 425, 432 (N.D. Ill. 1995) (outside accounting firm could be held primarily liable where it "played a central role in the drafting and formation of the alleged misstatements").

Several federal courts of appeal have observed that the Ninth Circuit's "substantial participation" test is inconsistent with the holding and rationale of *Central Bank*. Discussing *Software Toolworks* and some of the cases following it, the Tenth Circuit stated, "[t]o the extent these cases allow liability to attach without requiring a representation to be made by defendant, and reformulate the 'substantial assistance' element of aiding and abetting liability into primary liability, they do not comport with *Central Bank of Denver*." *Anixter*, 77 F.3d at 1226 n.10. Other courts, while not addressing *Software Toolworks* directly, likewise have concluded that the substantial participation test runs afoul of *Central Bank*. *See, e.g., Ziemba,* 256 F.3d at 1205 ("Such allegations of substantial assistance in the alleged fraud were the kinds of allegations that were rejected in *Central Bank*."); *Shapiro*, 123 F.3d at 720 ("Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms . . . all fall within the prohibitive bar of *Central Bank*."). For these reasons, we respectfully submit that the Court should not adopt the Ninth Circuit test.

Even under that test, however, plaintiffs' allegations against Citigroup fail to state a claim for primary liability. Plaintiffs nowhere allege that Citigroup participated in any way in the preparation or issuance of Enron's financial statements, SEC filings, press releases or any other allegedly false and misleading statements. Absent any allegations of such direct involvement in the making of any alleged misrepresentations or omissions, conduct is not actionable under Section 10(b). *See Murphy* v. *Hollywood Entm't Corp.*, No. Civ. 95-1926-MA (LEAD), 1996 WL 393662, at *6 n.10 (D. Or. May 9, 1996) ("[M]ere participation in a 'scheme' that includes the issuance of false financial statements . . . would fail under *Central Bank*. Plaintiffs must prove . . . that the underwriters were direct, knowing participants in the drafting of documents which included material misstatements and/or omissions."); *Employers Ins. of Wausau* v. *Musick, Peeler & Garrett*, 871 F. Supp. 381, 389 (S.D. Cal. 1994) (characterizing *Software Toolworks* as consistent with an earlier decision holding that secondary actors may be held primarily liable only if they participate directly in a misrepresentation), *partial reconsideration granted on other grounds*, 948 F. Supp. 942 (1995).

Accordingly, plaintiffs have not alleged conduct for which Citigroup may be held primarily liable under Section 10(b).

III.

PLAINTIFFS' CLAIM AGAINST CITIGROUP UNDER SECTION 11 SHOULD BE DISMISSED

Plaintiffs also assert a claim against Citigroup under Section 11 of the 1933 Securities Act, 15 U.S.C. §§ 77k, for its alleged role as underwriter of Enron 7% Exchangeable Notes issued on August 10, 1999. (Cplt. ¶ 1006.)[15] As we now show, that claim should be dismissed.[16]

A. Plaintiffs' Section 11 Claim Sounds In Fraud And Should Be Dismissed Under Rule 9(b)

Although fraud is not a required element of a claim under Section 11, a complaint asserting violations of Section 11 that "sounds in fraud" is subject to the same pleading requirements as a claim under Section 10(b), including the requirement of pleading fraud with particularity under Rule 9(b). *Lone Star Ladies Inv. Club* v. *Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) (Rule 9(b) applies to 1933 Act claims grounded in fraud); *Melder,* 27 F.3d at 1100 n.6 ("[w]hen 1933 Securities Act claims are

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15 To the extent that plaintiffs purport to assert a claim under Section 11 against Citigroup with respect to the Enron zero coupon notes issued July 18, 2001 (*see* n. 8, above), such a claim would fail for the reasons set forth in Sections A and C, below.

16 On this motion under Rules 12(b)(6) and 9(b), we do not address, but of course do not concede, the purported merits of plaintiffs' claim.

grounded in fraud rather than negligence . . . Rule 9(b) applies"); *Kurtzman*, slip op. at 75 (recognizing that the Fifth Circuit in *Lone Star* "expressly reaffirmed its holding in *Melder*" that Rule 9(b) applies to 1933 Act claims that sound in fraud); *In re Azurix Corp.*, 2002 WL 562819, at *11 ("Because their claims sound in fraud, plaintiffs' complaint must satisfy the strict pleading requirements for fraud set forth in [Rule] 9(b)"); *Collmer v. U.S. Liquids, Inc.*, 2001 U.S. Dist. LEXIS 23518, at *9, *104 ("where § 11 and § 12(a)(2) claims sound in fraud, the plaintiff is required to plead the circumstances constituting the alleged fraud with particularity under Rule 9(b)").

Plaintiffs' claims under the 1933 Act are based on the same essential factual allegations as their fraud claims. They therefore sound in fraud and should be dismissed for the reasons set forth in Point I, above. This is evident from the "Overview" section of the complaint, which repeatedly alleges that all of the defendants—including Citigroup—engaged in a massive fraud in connection with Enron. The complaint alleges that:

- Defendants participated "in a scheme to *defraud* or a course of business that operated as a *fraud* or *deceit* on purchasers . . . ." (Cplt. ¶ 2) (emphases added);
- "This *fraudulent* scheme and course of business enabled defendants to pocket billions of dollars . . . ." (*Id.* ¶ 3) (emphasis added);
- "This *fraud* was accomplished, in part, through *clandestinely* controlled partnerships . . . that defendants created . . . to inflate [Enron's] profits and hide its debt and thus *perpetuate the fraud* . . . ." (*Id.* ¶ 4) (emphases added); and
- "*Each defendant* is liable for (i) making false statements, or for failing to disclose adverse facts while selling Enron securities, and/or (ii) participating in a scheme to defraud and/or a course of business that *operated as a fraud or deceit* . . . ." (*Id.* ¶ 394) (emphases added).

In an apparent effort to circumvent the "sounds in fraud" doctrine, plaintiffs incorporate by reference for purposes of their Section 11 claim only a relative handful of the factual allegations in the earlier sections of the complaint (*see* Cplt. ¶ 1005), but even these paragraphs adopted by reference are rife with allegations of intentional and knowing fraud—not mere negligence. Plaintiffs allege in these paragraphs, among other things, that:

- Citigroup "engaged and participated in the *scheme to defraud* purchasers of Enron securities and Enron's course of business which operated as a *fraud and deceit* on purchasers of Enron's securities . . . ." (Cplt. ¶ 101, incorporated by reference in plaintiffs' 1933 Act claims, *see id.* ¶ 1005; emphases added);

- The statements made by defendants before the Class Period began "were false or misleading when issued," Enron's financial statements were "false and misleading," Enron was "concealing billions of dollars of debt that should have been reported on its balance sheet," Enron's transactions with the SPEs were "phony," the results of Enron's wholesale business "were manipulated and falsified" through "phony or illusory hedging transactions" and the "abuse of mark-to-market accounting," and Enron's forecasts were false and its historical earnings reports were "falsified and the result of improper accounting manipulations" (*id.* ¶ 121);

- The banks that sold Enron's securities to the public "were in a unique position to know that the statements made . . . in the Offering Documents . . . were false and misleading," because the banks "structured the underlying deals and . . . acted as counterparties to Enron's bogus hedging transactions . . . ." Thus, "the banks" "*kn[e]w* that Enron was leveraging billions in its own stock in *bogus* hedging transactions . . . ." (*id.* ¶ 617; emphases added);

- The offering documents also contained misrepresentations about Enron's capitalization, and "[t]he bankers . . . *knew* the undisclosed facts [because] *they were the ones that created the transactions* . . . ." (*id.* ¶ 619; first emphasis added);

- "[T]hose on the inside [including the banks] *knew* that the stock price issuance triggers were toxic for Enron." (*Id.* ¶ 621; emphasis added);

- Enron's offering documents also contained material misstatements about Enron's financial risk management, "as the banks . . . knew then because they had structured and prepared the documents for the bogus hedging transactions. Indeed, the banks, using the same risk analyses as Enron, concluded Enron's market risk was materially greater than that stated." (*Id.* ¶ 624);

- The banks "*knew*" that Enron's leveraging of its own stock in "*bogus hedging transactions*" increased Enron's risk "materially higher than what was represented [sic]" (*id.* ¶ 627; emphases added);

- Similarly, the banks "knew" that the offering documents for Enron's securities offerings materially understated its credit risk, because, as counterparties, "they were the ones that required the credit support in the bogus hedging transactions" (*id.* ¶ 628); and

- When Enron's stock price collapsed, "[t]he house of cards was crumbling before the eyes of those who engaged and participated in constructing it, so that they could protect hundreds of millions of dollars of fees, commissions and other charges" (*id.* ¶ 630).

Plaintiffs also attempt to avoid the sounds in fraud doctrine by asserting—in a single, conclusory sentence—that they disclaim reliance on any claim of fraud or intentional misconduct for purposes of their claim under Section 11. (*Id.* ¶ 1005.) As this Court held in *Kurtzman*, however, where the allegations on which plaintiffs' 1933 Act claims are based "are intrinsically demonstrative of fraud," boilerplate disclaimers of fraud do not relieve a plaintiff of the pleading requirements of Rule 9(b). *Kurtzman*, slip op. at 75; *see also In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.2 (9th Cir. 1996) ("These nominal efforts [at disclaiming fraud with respect to § 11] are unconvincing where the gravamen of the complaint is plainly fraud and no effort is made to show any other basis for the claims levied at the Prospectus."), *cert. denied sub nom. Anderson* v. *Clow*, 520 U.S. 1103 (1997); *Shaw* v. *Digital*, 82 F.3d 1194, 1223 (1st Cir. 1996) ("if a plaintiff were to attempt to establish violations of Sections 11 and 12(2) as well as the anti-fraud provisions of the Exchange Act through allegations in a single complaint of a unified course of fraudulent conduct, fraud might be said to lie at the core of the action. . . . It is the allegation of fraud, not the 'title' of the claim that brings the policy concerns to the forefront.") (internal quotations and modifications omitted); *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 430 (S.D.N.Y. 2001) (holding that "boilerplate disclaimer[s]" of fraud are "rejected"); *In re American Bank Note Holographics, Inc. Sec. Litig.*, 93 F. Supp. 2d 424 (S.D.N.Y. 2000) ("the boilerplate disclaimer of fraud in the Complaint not valid as applied to the 1933 Act claims" where the same facts alleging a "scheme of fraud" against defendants for violations of Section 10(b) and Rule 10b-5 are also alleged against defendants for violations of Sections 11 and 12(a)(2)).

Here, the allegations specifically incorporated by reference in plaintiffs' Section 11 claim are plainly "demonstrative of fraud," and accordingly that claim sounds in fraud and is barred by Rule 9(b).

B. Plaintiffs' Section 11 Claim Also Should Be Dismissed Because Plaintiffs Do Not And Cannot Allege Actual Reliance

Plaintiffs' Section 11 claim should be dismissed for the additional reason that the only named plaintiff who claims to have purchased the 7% Notes did so more than one year after the effective date of the registration statement, and plaintiffs do not and cannot plead that he actually relied on the prospectus in purchasing the Notes.

A Section 11 plaintiff who acquires securities more than twelve months after the effective date of the registration statement—as is the case here with respect to the Enron 7% Notes—must plead and prove *actual reliance* on the alleged material misstatements or omission contained in the prospectus. 15 U.S.C. § 77k(a);[17] *Greenwald* v. *Integrated Energy, Inc.*, 102 F.R.D. 65, 71 n.2 (S.D. Tex. 1984) ("Reliance is required under the one year provision of Section 11(a) . . . .").

The rationale of this requirement is that plaintiffs should not be assumed to rely on disclosures contained in a stale prospectus and registration statement when more timely and relevant financial information is publicly available. *See Rudnick* v. *Franchard Corp.,* 237 F. Supp. 871, 873 n.1 (S.D.N.Y. 1965) (noting that, "in all likelihood the purchase and price of the security purchased after publication of [a subsequent earning statement] will be predicated on that statement rather than on the information disclosed upon [the original] registration"). Later purchasers have access to current information about the security and the issuer and thus cannot be presumed to have relied on earlier information that has been superseded by subsequent disclosures and events. Thus, investors who wait to purchase securities until after the information in the prospectus is stale must plead and prove actual reliance on the prospectus as a precondition to any recovery.

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[17] The statute provides in relevant part:

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

15 U.S.C. § 77k(a).

As noted (p. 26), the only plaintiff who claims to have purchased 7% Notes, Murray van de Velde, purchased the notes on November 5 and 9, 2001, more than two years *after* August 10, 1999, when the notes were issued. (Cplt. ¶ 1006.) The complaint nowhere alleges that Mr. van de Velde relied on the offering prospectus in purchasing the notes. Moreover, as discussed above (p. 26-27), any such allegations would be utterly implausible, because at the time Mr. van de Velde purchased the notes the financial information in the prospectus was more than two years old, and the market had recently been flooded with negative reports about Enron.

Because Mr. van de Velde did not and could not have relied on the prospectus given the additional information about Enron that became available in the intervening period, he is barred from recovery under Section 11. And plaintiffs cannot pursue a class claim without at least one representative plaintiff with standing to assert that claim. *James* v. *City of Dallas,* 254 F.3d 551, 569 (5th Cir. 2001) ("Because the named Plaintiffs have failed to demonstrate Article III standing . . . we vacate that Class and remand with instructions to dismiss those claims."); *In re Paracelsus Corp.*, 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998) ("[A]n individual plaintiff who lacks standing to assert a claim on his or her own behalf cannot avoid dismissal by purporting to maintain the action on behalf of a class of which he or she is not a member.").

C. Plaintiffs Lack Standing To Bring A Section 11 Claim Under *Gustafson*

In *Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561 (1995), the Supreme Court held that standing to sue under Section § 12(2) of the 1933 Act is limited to persons who purchase securities in the offering, and that open market purchasers accordingly lack standing to sue under that section.

In subsequent cases, courts have held that the *Gustafson* rule applies to claims under Section 11 as well as to claims under Section 12(2). *See In re Azurix Corp.*, 2002 WL 562819, at * 22 ("[B]ecause it is undisputed that plaintiffs did not purchase their shares of Azurix stock pursuant to the company's initial public offering, the court concludes that plaintiffs have failed to state any actionable claim under § 11 or § 12(a)(2) of the Securities Act"); Paul C. Curnin & Christine M. Ford, *The Critical Issue of Standing Under Section 11 of the Securities Act of 1933*, 6 Fordham J. Corp. & Fin. L. 155, 156 (2001) (arguing that "Section 11 should be construed to confer standing only upon purchasers who acquired securities directly in a public offering.").[18] *Cf. In re Paracelsus Corp. Sec. Litig.*, 6 F. Supp. 2d 626, 631 (S. D. Tex. 1998) (noting that the Fifth Circuit has not addressed this issue).

As these courts have recognized, the same considerations that led the Supreme Court to hold in *Gustafson* that open market purchasers lack standing to sue

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[18] *See also Brosious* v. *Children's Place Retail Stores*, 189 F.R.D. 138, 144 (D.N.J. 1999); *In re Summit Med. Sys. Inc. Sec. Litig.*, 10 F. Supp. 2d 1068, 1070 (D. Minn. 1998); *Warden* v. *Crown Am. Realty Trust*, No. Civ A. 96-25J, 1998 WL 725946 at *2-*3 (W.D. Pa. Oct. 15, 1998); *Zeid* v. *Open Env't*, No. 96-12466-EFH, 1997 U.S. Dist. LEXIS 23469, at *2 (D. Mass. Dec. 16, 1997); *Van de Walle* v. *Salomon Bros., Inc.*, No. 9894, 1997 WL 633288, at *1 (Del. Ch. Oct. 2, 1997); *In re WRT Energy*, 1997 WL 576023, at *6; *Flecker* v. *Hollywood Entm't. Corp.*, No. 95-1926-MA (LEAD), 1997 WL 269488, at *2 (D. Or. Feb. 12, 1997); *Gannon* v. *Continental Ins. Co.*, 920 F. Supp. 566, 575 (D.N.J. 1996); *Murphy* v. *Hollywood Entm't. Corp.*, 1996 WL 393662, at *4. Other courts have held that *Gustafson* does not apply to Section 11 claims. *See*, *e.g.*, *Joseph* v. *Wiles*, 223 F.3d 1155, 1158 (10th Cir. 2000); *Dartley* v. *Ergobilt Inc.*, No. Civ. A 398CV1442M, 2001 WL 313964, at *3 (N.D. Tex. Mar. 29, 2001).

under Section 12(2) apply equally to Section 11. As explained in *Gustafson*, the predominant purpose of the 1933 Act, as reflected in its structure and legislative history, is to regulate new offerings of securities (in contrast to the 1934 Act, which principally regulates trading in the aftermarket). *Gustafson*, 513 U.S. at 571-72, 580; *see also Central Bank*, 511 U.S. at 171 ("[t]he 1933 Act regulates initial distributions of securities, and the 1934 Act for the most part regulates post-distributing trading"); *Ballay* v. *Legg Mason Wood Walker, Inc.*, 925 F. 2d 682, 691 (3rd Cir. 1991) (holding that the legislative history shows that "Congress' intent in enacting the 1933 Act was clearly to regulate initial offerings" and that "the legislators specifically stated: 'The bill affects only new offerings of securities . . . .') (quoting H.R. Rep. No. 73-85, at 7 (1933)). Moreover, the express limitation on damages under Section 11 to the price at which the securities were originally offered, 15 U.S.C. § 77k(g), makes sense only if such claims are asserted by initial purchasers; by contrast, aftermarket purchasers may pay more or less than the offering price for their securities, and may therefore suffer damages that are more or less than that amount.

Here, as discussed above, the only plaintiff who allegedly purchased 7% Notes did so more than two years after the offering—well after the initial offering period expired. Accordingly, he (like any other class member who purchased in the aftermarket) lacks standing under *Gustafson* to assert a Section 11 claim and his claim should therefore be dismissed.

IV.

PLAINTIFFS' CLAIMS AGAINST CITIGROUP AS A "CONTROLLING PERSON" SHOULD BE DISMISSED

Finally, plaintiffs purport to assert claims against Citigroup under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act for its alleged role as a "controlling person." (Cplt. ¶¶ 995, 1006, 1014.) Sections 15 and 20(a) impose joint and several liability on controlling persons for acts violating the 1933 and 1934 Acts by persons under their control. "Although worded in different ways, the control person liability provisions of § 15 of the 1933 Act and § 20(a) of the 1934 Act are interpreted the same way." *Collmer* v. *U.S. Liquids, Inc.*, 2001 U.S. Dist. LEXIS 23518, at *14; *Ellison* v. *American Image Motor Co.*, 36 F. Supp. 2d 628, 637-38 (S.D.N.Y. 1999) (cited with approval in *Collmer*). Plaintiffs' claims against Citigroup should be dismissed because the complaint does not allege any facts showing that Citigroup is a controlling person of any other defendant.

This Court has held that "[t]o survive a motion to dismiss a claim for controlling person liability . . . a plaintiff must allege (1) an underlying primary violation of § 11 by the controlled person, (2) control by the defendant over the controlled person, and (3) particularized facts as to the controlling person's culpable participation in (exercising control over) the fraud perpetrated by the controlled person." *Collmer*, 2001 U.S. Dist. LEXIS 23518, at *10 (citing cases); *In re Landry's Seafood*, slip op. at 11 n.14 (same). "Control" is defined as "'possession, direct or indirect, of the power to direct or cause the directing of management and policies of a person . . . .'" *Abbott* v. *Equity Group Inc.*, 2 F.3d 613, 619 n.15 (5th Cir. 1993) (quoting 17 C.F.R. §230.405 (f)).

The complaint does not even purport to satisfy these requirements as to Citigroup. Plaintiffs allege no facts showing that Citigroup had "control" over Enron or any other defendant. Indeed, the complaint does not even specify which of the other defendants Citigroup is alleged to have controlled. As this Court held, "dismissal is appropriate where the plaintiff fails to plead any facts from which it can reasonably be inferred that the particular defendant was a control person." *Collmer*, 2001 U.S. Dist. LEXIS 23518, at *10.

Moreover, for the reasons discussed above (pp. 28-58), the complaint does not sufficiently allege facts showing any "culpable participation" by Citigroup in any other defendant's wrongdoing. For that reason, too, plaintiffs' "controlling person" claims against Citigroup should be dismissed.

CONCLUSION

For the foregoing reasons, Citigroup's motion to dismiss should be granted, and the complaint should be dismissed with prejudice as to Citigroup.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was this day forwarded via e-mail, facsimile, or Federal Express overnight delivery to each of the counsel or parties listed on the attached Service List, pursuant to the Court's April 10, 2002 Order Regarding Service of Papers and Notice of Hearings.

Date: May 8, 2002

By: Eugene B. Wilshire

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